No. 134, Original

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

EXCEPTIONS BY NEW JERSEY TO THE REPORT OF THE SPECIAL MASTER AND SUPPORTING BRIEF

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EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

Article VII of the 1905 Compact between New Jersey and Delaware provides that "[e]ach State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." New Jersey excepts to the following conclusions of the Special Master with regard to Article VII of the Compact:

1. That, although New Jersey may make grants of riparian *rights* beyond the low-water mark on the New Jersey side of the Delaware River, it cannot make grants of riparian *lands* beyond the low-water mark. Report at 52, 99.

2. That New Jersey does not have exclusive riparian jurisdiction over improvements like piers and wharves on the New Jersey side of the river if they extend beyond the low-water mark. Report at 85-86, 99-100.

3. That Delaware may exercise its police power over riparian improvements like piers and wharves extending beyond the low-water mark on the New Jersey side, even to the extent of prohibiting improvements approved by New Jersey. Report at 85-86, 99-100.

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JURISDICTION

The original and exclusive jurisdiction of this Court rests upon Article III, section 2, of the United States Constitution and upon 28 U.S.C. § 1251(a).

STATUTORY PROVISION INVOLVED

The 1905 Compact between New Jersey and Delaware was ratified by Congress on January 24, 1907. *See* Act of January 24, 1907, ch. 394, 34 Stat. 858 (1907). Article VII of the Compact provides:

> "Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States."

STATEMENT

This case arises out of recent efforts by Delaware to block construction of a pier for unloading liquefied natural gas from vessels on the New Jersey side of the Delaware River. Although the pier would extend outshore of the low-water mark,[1] and thus past the New Jersey-Delaware boundary line, both New Jersey and Delaware agree that Article VII of the 1905 Compact between the States—an agreement entered into thirty years before the boundary was known—controls whether Delaware has regulatory authority over riparian projects on the New Jersey shore. Article VII provides that "[e]ach State may, on its own side of the river, continue to" exercise sovereign authority over "riparian" matters: that is, it may continue to "exercise riparian jurisdiction of every kind and nature," and it may continue to "make grants, leases, and conveyances of riparian lands and rights under [its] laws . . . ." In our view, that broad grant of authority gives New Jersey full authority to determine what riparian projects are constructed on its side of the river and, as a necessary corollary, bars Delaware from using its own sovereign powers to impede the exercise of that authority.

A. Regulatory History Before *New Jersey v. Delaware I* and the Compact of 1905

Although New Jersey and Delaware quarreled about the boundary between the two States almost from the beginning of statehood, *see New Jersey v. Delaware*, 291 U.S. 361, 376 (1934) (*New Jersey v. Delaware II*), that ongoing dispute actually had little effect on the States' authority to define and regulate the "riparian" rights of their citizens, at least with respect to the building and operation of riparian structures like piers and wharves. Prior to 1905, New Jersey had exer-

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[1] The "low-water mark" of a river is defined as "the point to which the water recedes at its lowest stage." Black's Law Dictionary 1623 (8th ed. 2004).

cised complete dominion over riparian improvements on the New Jersey shore, including on the Delaware River within the Twelve-Mile Circle.[2] Thus, in 1851, the New Jersey Legislature adopted the Wharf Act, 1851 N.J. Laws p. 335, which provided that an owner of riparian lands could "build docks, wharves, and piers in front of his lands, beyond the limits of ordinary low water," so long as the structures did not interfere with navigation and the owner had obtained a license "for that purpose." NJ App. 206a-210a. In 1864, the Legislature established the Board of Riparian Commissioners and authorized it to set pierhead and bulkhead lines in the Hudson River. NJ App. 217a-219a (1864 N.J. Laws ch. 391, saved from repeal at N.J. Stat. Ann. § 12:3-1). In 1869, the Legislature prohibited filling underwater lands and building structures outshore of the lines established by the Board. NJ App. 232a-239a (1869 N.J. Laws ch. 383, § 3, codified as N.J. Stat. Ann. § 12:3-3).

New Jersey expanded the Board's authority in 1871 to include all tidal waters outshore of the State's mean high-water line, also delegating to the Board the authority to approve grants and leases of underwater lands outshore of that line. NJ App. 242a (1871 N.J. Laws ch. 256, now codified as N.J. Stat. Ann. §12:3-10). As a result, in 1877 the Board adopted pierhead and bulkhead lines for a portion of the Delaware River within the Twelve-Mile Circle, outshore of Gloucester and Salem Counties. NJ App. 1197a, 1207a (Castagna Report, Figure 1 (*New Jersey v. Delaware II*, Plaintiff's Exh.144)). In 1891, New Jersey enacted legisla-

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[2] The Twelve-Mile Circle refers to an area encompassed by a circle centered at New Castle, Delaware, that was the subject of a conveyance from the Duke of York to William Penn in 1682. *See New Jersey v. Delaware II*, 291 U.S. at 364. The Twelve-Mile Circle intersects the eastern bank of the Delaware River so that the boundaries of six New Jersey municipalities are all or partially at the mean low-water line of the river.

tion that prohibited dredging under tidal waters without a license from the State, but provided that owners of State grants or leases had the right to dredge a channel from the area granted to them out to the main channel. NJ App. 249a-253a (1891 N.J. Laws ch.123, § 1, now codified as N.J. Stat. Ann. § 12:3-21).

These general enactments were complemented by specific grants to riparian owners. In 1854, for example, the New Jersey Legislature allowed Thomas D. Broadway to extend docks, piers or wharves into the Delaware River from the shoreline of what is now Pennsville Township, Salem County, "a sufficient distance for the accommodation of vessels navigating the said river," but not "so far into the said river as to injure or impede the navigation of same." NJ App. 211a (1854 N.J. Laws ch.143). Through subsequent legislation adopted in 1855, 1870, and 1871, the New Jersey Legislature similarly allowed other persons to build improvements within the Delaware River and Twelve-Mile Circle, outshore of the low-water line. NJ App. 214a-215a (1855 N.J. Laws ch.109 (Pennsgrove Pier Co.)); NJ App. 240a (1870 N.J. Laws ch.131 (Robert Walker)); NJ App. 241a (1870 N.J. Laws ch. 344 (Joseph Guest)); NJ App. 243a-244a (1871 N.J. Laws ch. 307 (Henry Barber)). In 1883, the Board of Riparian Commissioners (which had by then assumed the grant-making authority) granted submerged tidal lands within the Twelve-Mile Circle in the Delaware River to Daniel Kent, NJ App. 386a-391a, and, in 1891, the Board granted such lands to E. I. DuPont de Nemours ("Dupont"), NJ App. 399a-403a, and to Annie Brown. NJ App. 392a-398a. The Kent, Dupont, and Brown grants all referred to pierhead and bulkhead lines previously established by the Board as part of its ongoing responsibility to protect navigation. *See* NJ App. 1193a; 373a-374a (Castagna Report; Castagna Aff.). Those lines were necessarily located well outshore of low water, to allow vessels to travel between the piers and navigational channel. NJ App. 1198a (Castagna Report).

At this time, Delaware played no role in the approval or regulation of riparian improvements on the New Jersey side. Even on its own side, Delaware exerted little legislative or regulatory control over riparian improvements, leaving matters mostly to be resolved under common law.

B. *New Jersey v. Delaware I* And the Compact of 1905

The first original action between New Jersey and Delaware arose over fishing rights in the Delaware River, not over the erection of riparian improvements like piers and wharves. Delaware had enacted a law in 1872 prohibiting New Jersey fishermen from fishing in waters claimed by Delaware, unless they obtained a Delaware license. That action provoked New Jersey's Governor to issue a public notice and proclamation asserting that New Jersey had jurisdiction over the eastern half of the Delaware River and that the business of fishing in that area had always been conducted without interference by Delaware. NJ App. 245a-246a (1872 N.J. Laws p. 115). In 1876, the New Jersey Legislature adopted a Resolution stating that New Jersey had always claimed to own the eastern bed of the Delaware River, and that it was entitled to "exclusive jurisdiction" over that half of the river. NJ App. 247a-248a (1876 N.J. Laws p. 418) (*New Jersey v. Delaware II*, Plaintiff's Exh. 161, p. 24).

Efforts to resolve the dispute were not successful, and in 1877 New Jersey filed an original action against Delaware in this Court. *See* Bill of Complaint in *New Jersey v. Delaware*, Original No. 1 (*New Jersey v. Delaware I*) (Del. App. 20). In its Complaint, New Jersey asserted jurisdiction to the middle of the Delaware River, and sought to enjoin Delaware from arresting New Jersey residents or seizing New Jersey property in the river. Del. App. 20-54. The Complaint specifically referred to improvements—which included wharves, docks, and piers—extending from New Jersey's shoreline into the river, all of which had been constructed without interference by Delaware. Del. App. 36.

The Court responded promptly. In the same year that New Jersey filed its Complaint, the Court issued a preliminary injunction that restrained Delaware from imposing any tax or license fee on any New Jersey citizen or resident fishing in the Delaware River. NJ App. 99a-101a. The Order contained a specific finding that "for a long period of time, to wit, more than seventy years last past, the State of New Jersey has claimed and exercised jurisdiction over the easterly portion of the river Delaware to the middle of the same . . . ," NJ App. 100a, further noting that its citizens had freely fished in the river "during said period." NJ App. 100a. It then went on to find that Delaware "has interfered with and claimed to control the right of fishing thereon . . . ." NJ App. 100a. It enjoined Delaware from requiring New Jersey citizens to get a license for what they "have heretofore been accustomed to do." NJ App. 101a.

Despite its fast start, the case then lingered until 1901 when, at the insistence of the Court, Delaware finally filed its Answer. Del. App. 95-162. In the Answer, Delaware did not deny the existence of improvements extending from the New Jersey shoreline into the river or assert that it had exercised jurisdiction over their construction. Del. App. 117. Then, before a Commissioner appointed to hear the action, New Jersey presented evidence about grants of underwater lands by its Board of Riparian Commissioners within the Twelve-Mile Circle. NJ App. 74a-92a. New Jersey's witnesses also testified about existing improvements on the New Jersey shoreline within the Twelve-Mile Circle that extended to deep water, NJ App. 38a-39a, including a pier at Finn's Point, NJ App. 51a, new and old steamboat wharves at Pennsville, NJ App. 53a, and a wharf in front of French's Hotel, in what is now Penns Grove Township, that extended 400 to 600 feet into the Delaware River. NJ App. 54a. Additional testimony showed that, as of 1903, the New Jersey Board of Riparian Commissioners had established pierhead and bulkhead lines

outshore of all of Salem County and Gloucester County, New Jersey, within the Twelve-Mile Circle. NJ App. 81a-87a.

Both States appointed Commissioners in an attempt to resolve the lawsuit. The Commissioners met in 1903 and reached agreement on what eventually became the Compact of 1905. The New Jersey Legislature first ratified the Compact on April 8, 1903, NJ App. 256a-261a (1903 N.J. Laws ch. 243), after a report from the New Jersey Commissioners, NJ App. 102a-104a, stating that, while the exact geographical boundary still remained unsettled, "nevertheless every interest of the State of New Jersey has been protected, all its riparian, fishery and other rights and jurisdiction thoroughly safeguarded and every question of practical difficulty between the two States settled for all time." NJ App. 103a. However, the Delaware Legislature did not adopt the Compact at that time. In a letter to the New Jersey Commissioners, the Delaware Commissioners explained that the legislation had failed, based on the view in Delaware that it would "surrender directly or indirectly . . . the title and jurisdiction which the State of Delaware claims to and over the soil and waters of the Delaware River within the twelve mile circle." NJ App. 105a-106a.

Delaware eventually receded from its opposition, and the Commissioners once more agreed on the terms of the Compact. Del. App. 1-8. The Delaware Legislature ratified the Compact on March 20, 1905, and the New Jersey Legislature followed suit the next day. 23 Del. Laws ch. 5 (1905), NJ App. 6a-13a; 1905 N.J. Laws ch. 42, NJ App. 262a-267a. Congress approved the Compact in 1907. *See* Act of Jan. 24, 1907, Ch. 394, 34 Stat. 858 (1907) (Del. App. 11a-14a).

C. Regulatory History Between the Compact and *New Jersey v. Delaware II*

After the Compact was adopted, New Jersey continued to exercise full jurisdiction over improvements appurtenant to

its shoreline within the Twelve-Mile Circle, again without interference by Delaware. In 1914, the New Jersey Legislature adopted the Waterfront Development Law, N.J. Stat. Ann. §§ 12:5-1 *et seq.* (1914 N.J. Laws ch. 123), NJ App. 283a-289a, which, among other things, required any person proposing a waterfront development such as a dock, wharf, or pier, to obtain approval from the newly-created New Jersey Harbor Commission, N.J. Stat. Ann. § 12:5-3, and declared any structure erected without approval to be "a public nuisance." N.J. Stat. Ann. § 12:5-6 (NJ App. 287a). Moreover, New Jersey continued its practice of conveying underwater lands outshore of mean low water within the Twelve-Mile Circle. For example, in 1917, the New Jersey Legislature granted to the United States jurisdiction and title over lands in the Delaware River, although it retained sovereignty and jurisdiction to serve civil and criminal process. NJ App. 298a-301a (1917 N.J. Laws ch. 189). In addition, between 1916 and 1930, New Jersey conveyed or leased underwater lands outshore of low water within the Twelve-Mile Circle to more than a dozen individuals and businesses, *see* NJ App. 404a-485a, with grants that extended hundreds of feet outshore of low water. *See, e.g.*, NJ App. 404a-411a, 427a, 438a, 457a-462a.

D. *New Jersey v. Delaware II*

In 1929, following a dispute over oyster beds in the Delaware Bay, New Jersey filed a second original action against Delaware, in which New Jersey alleged that, within the Delaware River and Bay, the New Jersey-Delaware boundary was located at the middle of the navigational channel. Del. App. 202-203. In response, Delaware alleged that, within the Twelve-Mile Circle, the boundary was located at the mean low-water line on the New Jersey side, and that, below the Twelve-Mile Circle, the boundary was located at the geographic middle of the Delaware River and Bay. Del. App. 218. *See also New Jersey v. Delaware II*, 291 U.S. at 363-64.

To support its position on the boundary within the Twelve-Mile Circle, New Jersey argued that, since 1854, it had conveyed underwater lands extending outshore of the mean low-water line without objection from Delaware and that the granted underwater lands now contained valuable improvements, including some on granted lands purchased by Delaware citizens. NJ App. 136a. In response, Delaware contended that the grants and improvements did not conflict with the boundary claimed by Delaware, because "[r]iparian rights of the New Jersey side of the river were recognized by the Compact of 1905." NJ App. 123a. In addition, Delaware stated that "Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey and a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights." NJ App. 123a. Then, at oral argument before the Special Master, Delaware counsel asserted that "the Compact of 1905 expressly acknowledged the rights of the citizens of New Jersey, at least, by implication to wharf out, and in my view the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them, and it was a very sensible thing to do." NJ App. 126a-1. While the Special Master ultimately sided with Delaware on the boundary issue, he found that, under the Compact, Delaware had "recognized the rights of riparian owners to wharf out on the easterly side . . . within the twelve-mile circle" (NJ App. 131a) and recommended that, within the Twelve-Mile Circle, "the river and the subaqueous soil thereof shall be adjudged to belong to the State of Delaware, subject to the Compact of 1905." NJ App. 132a.

Excepting to the Special Master's report, New Jersey continued to argue that the boundary should be in the middle of the channel, based in part on its longstanding activities within the Twelve-Mile Circle. NJ App. 136a. In reply, Delaware advised the Court that it had "never questioned the right of citizens of New Jersey to wharf out to navigable water," and

represented that such a right could not "be questioned now because it is clearly protected by the Compact of 1905 between the States." NJ App. 139a. Moreover, Delaware reassured the Court that a boundary at the low-water line within the Twelve-Mile Circle would neither destroy nor seriously prejudice the rights of New Jersey's riparian owners, because the Compact of 1905 "recognized the rights of riparian owners in the river to wharf out, and the Master so found." NJ App. 140a. Delaware stated that, through the Compact of 1905, it had "recognized the rights of the inhabitants on the east side of the river to wharf out to navigable water" and that this right "had never been questioned." NJ App. 141a. The Court followed the recommendations of the Special Master and set the New Jersey-Delaware boundary within the Twelve-Mile Circle at the mean low-water line on the New Jersey side, "subject to the Compact of 1905." *New Jersey v. Delaware II*, 291 U.S. at 385; *see also* NJ App. 23a (Decree) (boundary determination "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states").[3]

E. Regulatory History after *New Jersey v. Delaware II*

For at least several decades, the decision in *New Jersey v. Delaware II* had little impact on the regulation of riparian improvements in New Jersey. During that period, New Jersey carried on its customary practice of conveying underwater lands outshore of low water within the Twelve-Mile Circle, without objection by Delaware. *See* NJ App. 554a-588a. In addition, New Jersey continued to regulate the construction of improvements on underwater lands outshore of mean low

[3] The language in the decree referring to the Compact of 1905 reflected an agreement by the Attorneys General of Delaware and New Jersey, NJ App. 195a, reached in part "for protection of many Delaware corporations who have acquired wharfage rights in New Jersey." NJ App. 184a.

water and within the Twelve-Mile Circle. *See, e.g.*, NJ App. 664a-669a (DuPont project).

Eventually, however, Delaware began a gradual process of claiming authority to regulate riparian improvements on the New Jersey side, particularly after Delaware adopted its Coastal Zone Act in 1971. 58 Del. Laws ch. 175 (1971). That year, in conjunction with plans by Dupont to build a tanker unloading and storage facility at its Chambers Works Plant in Deepwater, New Jersey, Delaware attempted to lease to Dupont underwater lands that New Jersey previously had granted to Dupont in 1916. NJ App. 1300a-1301a. Dupont objected, however, asserting that "the 1905 Treaty between New Jersey and Delaware ceded to the State of New Jersey full authority over subaqueous lands from the New Jersey shore to the center of the Delaware River, including the right to convey title to such lands; and that the subsequent Supreme Court cases did not, and in fact could not, modify the terms of said Treaty." NJ App. 648a. In the face of Dupont's objection, Delaware agreed to defer collection of lease payments until the question was resolved, NJ App. 649a, and issued a lease to Dupont providing that it was "without prejudice to the title claim of either party." NJ App. 651a. There is no evidence that Dupont has made any lease payments to Delaware. NJ App. 1161a, ¶ 195.

Delaware did ultimately come to play a more direct role in regulating other projects on the New Jersey side. For example, in 1991, Delaware issued a permit, as well as a lease of submerged lands, for a coal unloading facility to be constructed by Keystone Congeneration Systems, extending from the New Jersey shoreline. *See* NJ App. 1163, ¶ 207. Then, five years later, Delaware and the New Jersey Division of Parks and Forestry entered into a subaqueous land lease, related to the rehabilitation of an historic pier and a new floating ferry dock outshore of mean low water, near a New Jersey State Park (Fort Mott) in Salem County, New Jersey

and a Delaware State Park. NJ App. 1163a-1164a, ¶¶ 208-209. And, in 2005, Delaware entered into a subaqueous lands lease with Fenwick Commons, LLC, related to the construction of a 750-foot pier extending from the New Jersey shoreline of Penns Grove, Salem County, New Jersey into the Delaware River within the Twelve-Mile Circle. NJ App. 1164a, ¶¶ 210, 211.

New Jersey also released a 1979 report entitled "Options for New Jersey's Developed Coast," addressing management of waterfront areas, including the Delaware River waterfront, within the Twelve-Mile Circle. NJ App. 1053a-1056a. The report stated, among other things, that "major development extending into the Delaware River could require approval from the State of Delaware, in addition to approvals from the State of New Jersey." NJ App. 1053a. It contained no reference, however, to the Compact of 1905. In addition, New Jersey promulgated an extensive Coastal Zone Management Plan in 1980, *see* NJ App. 1057a-1063a, that acknowledged the potential for conflict between New Jersey and Delaware within the Twelve-Mile Circle and stated that a New Jersey project extending from the New Jersey shoreline into Delaware territory would require permits from both states. NJ App. 1065a. The Coastal Zone Management Plan likewise made no mention of the 1905 Compact.

The relatively harmonious relations between the States changed course in 2005 after Delaware denied an application by Crown Landing, LLC, for a coastal zone approval, advising Crown Landing that its proposed pier and associated onshore liquefied natural gas facility on the New Jersey side of the river was "prohibited" under Delaware's Coastal Zone Act. NJ App. 1164a, ¶¶ 212, 213. After Delaware purported to block this project, New Jersey sought to resolve the matter by calling Delaware's attention to Article VII of the 1905 Compact. NJ App. 1109a-1111a. In addition, the New Jersey Assembly passed a Resolution asking Delaware to amend its

laws to make clear that those laws were subject to the 1905 Compact. NJ App. 1114a-1116a. These efforts were unsuccessful, NJ App. 1112a-1113a, and this action followed.

F. This Action

New Jersey filed the present action in 2005, seeking to reopen the 1935 Decree in *New Jersey v. Delaware II* or, alternatively, to file a new Bill of Complaint. This Court denied the motion to reopen, but granted leave to file the Complaint. It then appointed Ralph I. Lancaster, Jr., as Special Master and authorized him to conduct additional proceedings. *See New Jersey v. Delaware*, 126 S. Ct. 1184 (2006).

The Special Master submitted his report on April 12, 2007, concluding that Article VII of the 1905 Compact, while granting New Jersey certain riparian authority, nonetheless allowed Delaware to exercise jurisdiction over riparian projects, such as the Crown Landing facility, on the New Jersey shore. He stated that "[b]ecause Delaware owns the land and water up to the low water mark, the starting presumption is that Delaware, as the sovereign State, has jurisdiction over its own land." Report at 34. That presumption was then reinforced by "'a strong presumption' against defeat of a State's title." Report at 42 (quoting *United States v. Alaska*, 521 U.S. 1, 34 (1997) (further internal quotation marks omitted)). The Special Master thus determined that "'a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms.'" Report at 43 (quoting *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987)).

Turning to the specific provisions of Article VII, the Special Master first rejected Delaware's argument that the phrase "on its own side of the river" meant that any authority conferred by Article VII was subject to—and thus, in New Jersey's case, curtailed by—the later establishment of the boundary at the low-water mark on the New Jersey side.

Report at 35-40. Pointing out that "New Jersey had a long history of making land grants along its shore, setting boundaries, adopting pierhead and bulkhead lines, and the like," Report at 37, the Special Master reasoned that "[h]ad the States intended that the resolution of the boundary render Article VII void, they would have said so in clearer terms." Report at 37. He also noted that Delaware's argument was "belied by the language of Article IX" of the Compact declaring that the Compact was "'binding in perpetuity upon both of said states.'" Report at 38.

The Special Master then addressed the clause in Article VII providing that each State "may continue to . . . make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." Report at 40-52. According to the Special Master, pursuant to that language, New Jersey's authority to grant riparian lands was significantly more circumscribed than its authority to grant riparian rights. As to riparian lands, he found that the presumption against surrender of title, as well as language in Article VIII of the Compact, meant that "[t]he Compact preserves for New Jersey the authority to make grants of riparian *lands* down only to the low water mark on the New Jersey shore." Report at 51; *see also* Report at 99-100. By contrast, the Special Master concluded that, as to riparian rights, "the Compact preserves for New Jersey the authority to make grants of riparian *rights* outshore of the low water mark under New Jersey's law of riparian rights, including the right to construct wharves and other improvements extending to navigable waters flowing over subaqueous soil owned by Delaware." Report at 51-52. The Special Master stressed, however, that this "preserved authority under Article VII of the Compact to make grants of 'riparian rights,' including the right to build wharves or to authorize private landowners on its shores to do the same, is subject to reasonable regulation by the State." Report at 51.

Turning to the clause in Article VII providing that each State "may continue to exercise riparian jurisdiction of every kind and nature," Report at 52-86, the Special Master found that it was of relatively narrow scope. As he saw it, "historically, the authority to exercise riparian rights has been viewed as separate from—and subservient to—a State's general regulatory law." Report at 56. He thus went on to conclude that "[t]he phrase 'riparian jurisdiction' fairly can be read only to mean the authority of each State, on its own side of the River, to establish and oversee the riparian rights associated with land appurtenant to the River, under its own laws," Report at 57, not as a "confirmation of broader police powers to regulate all activities that might be conducted on riparian improvements even to the extent those improvements cross the boundary line." Report at 57. In addition, the Special Master found that the riparian jurisdiction conferred by Article VII was not "exclusive" (Report at 61-68, 99-100)—at least on the New Jersey side—saying that "there is nothing in the language of the Compact suggesting that such jurisdiction would be exclusive for improvements straddling the boundary line." Report at 62. He supported his reading by relying on evidence of recent regulatory dealings between the States, Report at 68-84, stating that New Jersey had explicitly and implicitly "recogn[ized] . . . Delaware's right to regulate projects on and outward from New Jersey's shore." Report at 78.

The Special Master thus determined that the States had concurrent jurisdiction over improvements on the New Jersey shore that extended into Delaware territory. Report at 86, 99-100. He acknowledged that this Court had recently rejected the idea of such concurrent jurisdiction in *Virginia v. Maryland*, 540 U.S. 56 (2003), holding there that Maryland could not exercise regulatory authority over riparian projects on the Virginia side of the Potomac River, even if they crossed into Maryland territory (*i.e.*, past the low-water mark on the

Virginia side).[4] Report at 64-65 n.118. He declined to follow that decision, however, finding it distinguishable because of "the unique language of the compact and arbitration award involved in that case." Report at 64 n.118.[5]

SUMMARY OF ARGUMENT

Our position in this case is straightforward: that Article VII of the 1905 Compact between New Jersey and Delaware gives each State complete regulatory authority over the construction and operation of riparian improvements on its shores, even if the improvements extend past the low-water mark. By its plain terms, Article VII confers full authority on each State to make grants of "riparian rights," to make grants of "riparian lands," and to "exercise riparian jurisdiction of every kind and nature" on its side of the river. Taken together, and understood in historical context, those grants of authority, at a minimum, include the exclusive authority to decide whether owners of riparian land may construct piers and wharves extending past the low-water mark for the loading and unloading of goods. And, while Delaware unquestionably can exercise its police power outshore of the low-water mark, it cannot do so in a manner that would interfere with the riparian authority expressly granted to New Jersey in Article VII. The Special Master's conclusion to the contrary, therefore, was in error.

I. A. The Special Master got off on the wrong foot by employing a heavy presumption in Delaware's favor. According to the Special Master, because Delaware owns the sub-

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[4] Special Master Lancaster was also the Special Master in *Virginia v. Maryland*.

[5] The Special Master also determined that Delaware was not judicially estopped from challenging New Jersey's interpretation of Article VII. Report at 86-92, and that Delaware had not lost jurisdiction through prescription and acquiescence. Report at 92-99. New Jersey is not excepting to those conclusions.

merged lands outshore of the low-water mark on the New Jersey side of the river, *see New Jersey v. Delaware*, 291 U.S. 361 (1934), he was obliged to apply a "strong presumption against defeat of a State's title," Report at 42 (internal quotation marks omitted), one that required any surrender of Delaware's territorial jurisdiction to be made in "unmistakable terms." Report at 43 (internal quotation marks omitted). But this approach is plainly incorrect: this Court has recently held that the presumption against defeat of title is *not* applicable to the construction of Compacts entered into when title was unsettled, *see Virginia v. Maryland*, 540 U.S. 56, 67-69 (2003), as is the case here. Article VII thus must be read according to its terms, not in light of a predetermined bias toward Delaware.

If Article VII is looked at without the distorting presumption, it is first evident that Article VII grants exclusive—not concurrent—riparian authority to each State on its side of the river: that is, it gives only one State authority to grant riparian lands and rights and to exercise riparian jurisdiction on each side. Although the Special Master found that New Jersey merely had non-exclusive "riparian jurisdiction" past the low-water mark on its side—and no authority at all to grant "riparian lands" beyond that point—Article VII provides no textual basis for this patchwork of regulatory authority. Nothing in Article VII says that Delaware will have any kind of riparian authority on the New Jersey side of the river; it states only that Delaware (like New Jersey) will have authority "on its own side of the river." Furthermore, Article VII specifies that each State is to have specific authority to make grants of riparian lands and rights under the laws of the granting State, which on the New Jersey side is New Jersey.

That this authority is exclusive is reinforced by the language in Article VII providing that each State "may continue to" exercise its riparian jurisdiction and make grants of riparian lands and rights. There is no question that, prior to the

time of the Compact, New Jersey alone had regulated the construction and operation of riparian improvements on its shores, including those that extended past the low-water mark. Thus, New Jersey had enacted statutes governing the right to right to erect piers and wharves as early as 1851, and it had granted numerous approvals and interests in submerged lands, including lands outshore of the low-water mark, so that those piers and wharves could be built. By contrast, Delaware had neither exerted nor claimed any regulatory authority over riparian improvements on the New Jersey side.

Although the Special Master placed emphasis on the fact that Article VII does not contain the word "exclusive," that omission is of little significance. Article VII expressly confers "riparian jurisdiction of every kind and nature," and that language is more than enough to foreclose another State from exercising "riparian jurisdiction" on the same side of the river. And, of course, the riparian jurisdiction exercised by New Jersey in the past—the jurisdiction that Article VII allows New Jersey to "continue to exercise"—*was* exclusive on its shores. The jurisdiction conferred by Article VII thus is exclusive to each State, not shared between them.

B. The riparian authority conferred on New Jersey by Article VII is not only exclusive, but broad in nature. At the very least, it encompasses full authority to decide what riparian improvements may be constructed on the New Jersey shore, regardless of whether the improvements extend past the low-water mark. As of 1905, it was well-understood that state law defined the rights of riparian owners, *see Shively v. Bowlby*, 152 U.S. 1, 40-47 (1894), and one prominent right in New Jersey and most other States was the "right to erect wharves to reach the navigable portion of the stream." 1 Henry Philip Farnham, *The Law of Waters and Water Rights* § 62, at 279 (1904). Indeed, recognition of that right was considered "a necessity if commerce is to be carried on by water." Farnham, § 111, at 520.

To enable the piers and wharves to extend into navigable water, however, the States had to grant the necessary interests in submerged lands beyond the low-water mark. New Jersey had recognized that riparian owners could wharf out past the low-water mark well before 1905, and it had long been granting the appropriate interests in land to do so, first by specific legislation and then by grants from the Board of Riparian Commissioners. Against this background, New Jersey's express Article VII authority to "continue to" grant riparian rights and lands necessarily would have included the authority to grant riparian rights and lands *beyond* the low-water mark, not just up to it. If Article VII had provided for anything less, in fact, it would have been dramatically curtailing New Jersey's ability to advance its important commercial interests.

The Special Master nevertheless concluded that Delaware could regulate (and, apparently, even veto) riparian improvements on the New Jersey side, saying that, whatever riparian authority Article VII had granted to New Jersey, it had left Delaware free to exercise its "separate" police power. Report at 56. But this theory rests upon a fundamental misconception: a State's authority to define riparian rights is *not* "separate" from its police power, but inextricably linked to it. As this Court long ago noted, "among those rights [of the riparian owner] [is] . . . the right to make a landing, wharf or pier for his own use or the use of the public, *subject to* such general rules and regulations as the legislature may see proper to impose for the protection of the public, whatever those may be." *Yates v. City of Milwaukee*, 77 U.S. 497, 504 (1870); *see also* Farnham § 64b, at 290 ("the limit of the private right is imposed by the public right"). In determining the extent of riparian rights, therefore, or in exercising its riparian jurisdiction, a State inevitably must measure the extent of the private landowner's interest against the public interest protected by its police power.

A State's general power to define riparian rights likewise includes the power to determine what the permissible *use* of wharves and piers might be. A State's authority to restrict the permissible uses of property is part and parcel of its obligation to specify the scope of state property rights, *see Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001), and a State's grant of the right to build a pier or wharf would typically carry with it the right to use that structure for its intended purpose: the docking of vessels in order to load and unload goods. And, while the Special Master apparently believed that Delaware could decide *what* goods are suitable for unloading, it is extremely doubtful that the drafters of the Compact, well aware of the importance of piers and wharves to economic progress, would have given Delaware the power to choose those goods that could, and could not, be unloaded from vessels on the New Jersey shore.

The riparian authority given to New Jersey by Article VII, while broad, does not preclude Delaware from all exercise of its police power on the eastern half of the river: it simply prevents Delaware from using that power to interfere with New Jersey's riparian authority. Although Delaware claims that, despite New Jersey's authority over riparian matters, it can trump that authority with respect to riparian structures beyond the low-water mark, this Court rejected just such a sweeping assertion of police power in *Virginia v. Maryland*, 540 U.S. at 72, holding that Maryland could not exercise its sovereign authority to interfere with riparian improvements on the Virginia shore. Here, contrary to the view of the Special Master, *see* Report at 64-65 n.118, the language of the 1905 Compact is even more unequivocal that each State has full riparian authority on its shores, speaking directly to the extent of the respective States' *sovereign* authority over riparian rights. New Jersey thus can exercise full control over riparian improvements on the New Jersey side of the river.

II. Post-Compact actions by the States do not support Delaware's view of Article VII. Although the Special Master placed considerable emphasis on such actions, he erred by failing to distinguish between actions taken with direct knowledge of the Compact and those taken with no apparent awareness of the Compact at all, much less of the specific provisions of Article VII dealing with riparian authority. The Special Master thus paid little attention to numerous representations by Delaware in *New Jersey v. Delaware II* about the broad scope of New Jersey's riparian authority under the Compact—representations that included, among other things, the opinion of its counsel that "the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of [wharves on its side] and to say who shall erect them." NJ App. 126a-1. Similarly, the Special Master mistakenly dismissed or disregarded other evidence showing that Delaware had specifically acknowledged New Jersey's rights under the Compact, while giving too much weight to actions by New Jersey that, although accepting some involvement by Delaware in the approval of New Jersey riparian projects, reveal no knowledge of the Compact at all. And, in any event, the handful of New Jersey actions ultimately relied on by the Special Master are far fewer than the comparable examples of "acquiescence" that this Court found to be insufficient in *Virginia v. Maryland*. *See* 540 U.S. at 63.

ARGUMENT

Article VII of the 1905 Compact between New Jersey and Delaware provides that "[e]ach State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." Although Article VII, by its plain terms, appears to grant equal and uniform regulatory authority to each State, the Special Master instead interpreted it to confer a patchwork of regulatory authority on the New Jersey (but not

Delaware) side of the river, assigning authority to each State depending on what power is at issue and where it is being exercised. Erroneously applying a presumption against defeat of a State's title, *see Virginia v. Maryland*, 540 U.S. 56, 67-69 (2003) (presumption inapplicable where boundary disputed), the Special Master concluded that New Jersey has the authority to grant riparian *rights* past the low-water mark on its side, but no authority to grant riparian *lands* past that mark, even though the text of Article VII treats those two powers exactly the same. In addition, the Special Master decided that, while New Jersey can exercise riparian *jurisdiction* beyond the low-water mark, its authority to do so is not exclusive: that is, Delaware not only has concurrent jurisdiction on the New Jersey side, but can block New Jersey-approved riparian projects by the exercise of its "separate" police power.

Neither the language of Article VII nor its historical background provides any basis for this haphazard pattern of state regulatory authority. Rather, read as it was written, Article VII gives each State complete regulatory control over the construction of riparian improvements on its shores. *First*, Article VII confers three forms of riparian authority—to make grants of riparian rights, to make grants of riparian lands, and to exercise riparian jurisdiction—that are, by the straightforward terms of Article VII, exclusive to each State on "its own side of the river," not shared between them. *Second*, this "riparian" authority, understood in historical context, gives each State full power to approve the construction and operation of riparian structures (like piers and wharves) on its side of the river, and to grant the necessary riparian rights and lands to do so, even though those improvements extend past the low-water mark. *Third*, while Article VII does not deprive Delaware of all its police power on the eastern half of the river, it does bar Delaware from exercising its police power in a way that would undercut the riparian authority given to New Jersey. *See Virginia v. Maryland*, 540

U.S. at 69-72. For example, and of particular relevance here, it may not block the Crown Landing project that gave rise to this litigation.

Before turning to these issues, we note at the outset that the Special Master correctly rejected Delaware's principal argument with respect to Article VII: that it was merely a "stand-still" agreement pending final determination of the boundary between the two States. *See* Report at 35-40.[6] According to Delaware, New Jersey lost much of its authority to approve and regulate riparian improvements "on its own side of the river" as soon as this Court concluded that the boundary was at the low-water mark on the New Jersey side, *see New Jersey v. Delaware*, 291 U.S. 361 (1934), leaving New Jersey with no jurisdiction at all beyond that line. But as the Special Master noted, this argument is unpersuasive. Most obviously, it is flatly contrary to language in Article IX of the Compact, which specifies that, upon approval by both States and ratification by Congress, the Compact "shall become binding in perpetuity upon both of said States . . . ." That language clearly indicates that, whatever the boundary might turn out to be, the authority conferred by Article VII, as well as by other Articles of the Compact, was to remain in force.

In addition, as we discuss in more detail later, it is unquestioned that prior to 1905 New Jersey had a long history of making grants of riparian rights and lands, including grants that allowed riparian owners to erect wharves and piers beyond the low-water line, without any interference by Delaware. If the Compact had intended to make that custom subject to termination, either then or later, it is reasonable to expect that the Compact would simply have said so. Instead, Article VII says just the opposite: that each State "may . . .

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[6] We state our views on this point only briefly. If Delaware files exceptions to the Special Master's Report with regard to this issue, we will address it further in our reply.

continue to" exercise riparian jurisdiction and grant riparian lands and rights. Indeed, thirty years later, in *New Jersey v. Delaware II*, this Court expressly recognized that its boundary determination was "subject to the Compact of 1905," 291 U.S. at 385, not the other way around. That decision thus did not alter the scope of New Jersey's authority under the Compact.

I. THE AUTHORITY CONFERRED BY ARTICLE VII OVER RIPARIAN IMPROVEMENTS IS BROAD AND EXCLUSIVE TO EACH STATE ON ITS SIDE OF THE RIVER

A. The Special Master Improperly Applied a Presumption Favoring Delaware

In finding that Article VII gave New Jersey only piecemeal regulatory authority over riparian improvements on its side of the river, the Special Master made several critical errors. The first—and one that tainted much of the subsequent Report—was that he stacked the interpretative deck by reading Article VII through the perspective of "'a strong presumption against defeat of a State's title.'" Report at 42 (quoting *United States v. Alaska*, 521 U.S. 1, 34 (1997)). To implement that presumption, the Special Master declared that "'a waiver of sovereign immunity will not be implied, but instead must be surrendered *in unmistakable terms*.'" Report at 43 (quoting *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987) (emphasis added)). The Special Master then found that New Jersey's interpretation of the Compact was not sufficiently "unmistakable" to meet that exacting standard.

This Court has recently held, however, that the presumption against defeat of title is not applicable when a State's "title" is in dispute at the time of the relevant agreement. *See Virginia v. Maryland*, 540 U.S. at 67-69. In that case, Maryland had argued that the Court should apply the presumption against defeat of title in interpreting the 1785 Com-

pact between itself and Virginia, relying on the fact that Maryland had later been found to own the riverbed of the Potomac River up to the low-water mark on the Virginia side. *See* 540 U.S. at 67. The Court disagreed. While remarking that "Maryland is doubtless correct that if her sovereignty over the River was well settled as of 1785, we would apply a strong presumption against reading the Compact as stripping her authority to regulate activities on the River," 540 U.S. at 67 (citing *Massachusetts v. New York*, 271 U.S. 65, 89 (1926)), the Court noted that "the scope of Maryland's sovereignty over the River was in dispute both before and after the 1785 Compact." 540 U.S. at 68. Setting aside the presumption, therefore, the Court instead chose to "read the 1785 Compact in light of the ongoing dispute over sovereignty." 540 U.S. at 69.

The same uncertainty about title was present at the time of the Compact in this case. As of 1905, Delaware's title to submerged lands off the New Jersey shore, far from being accepted as fact by the parties, was being questioned in an ongoing lawsuit brought by New Jersey before this Court. *See New Jersey v. Delaware*, No. 1, Orig. (filed 1877), Del. App. 20-54. Indeed, for the States, a primary purpose of entering into the Compact was to establish common ground on various jurisdictional issues so that the litigation could be discontinued. *See* Report, App. B, Preamble (Commissioners appointed to reach an agreement "looking to the amicable termination of said suit between said States" and "the final adjustment of all controversies relating to . . . their respective rights in the Delaware River and Bay"). If each State had refused to give up its territorial rights as it then saw them, no resolution along the lines of the Compact would have been possible.

The Special Master failed to appreciate that fact because he looked at the Compact solely from Delaware's standpoint, treating the boundary line as though it had already been

established at the New Jersey low-water mark in 1905. But, at the relevant time, New Jersey had a completely different view, regarding the boundary as being in the middle of the channel. Thus, if Article VII were to be read in light of what each State *thought* that it had dominion over, it is evident that New Jersey would have been in exactly the same position that Delaware was, with each State believing that it owned the submerged lands between the low-water mark on the New Jersey side and the middle of the channel. Indeed, given the fact that New Jersey alone had previously regulated riparian improvements in the disputed area, *see* pages 28-30 *infra*, it would actually make more sense to presume that New Jersey would resist surrender of that exclusive authority than to presume that Delaware would insist on gaining part of it. In any event, however, a presumption that can work both ways at once is not a useful interpretive tool.

The misguided search for "unmistakability" also led the Special Master to misapply the terms of Article VIII of the Compact, which provides that "[n]othing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth." Although the Special Master saw Article VIII as an additional hurdle for New Jersey to clear, *see* Report at 43 (saying that Article VIII was "consistent with" the presumption against surrender of jurisdiction), the broad grants of riparian authority *are* "expressly set forth" in Article VII, thus fully meeting the condition set forth in Article VIII. The Special Master evidently thought that the language of Article VII was not "express[]" *enough*, but that insistence on heightened clarity simply transports the "unmistakability" doctrine into the provisions of Article VIII, again employing it in circumstances where it does not belong. The text of Article VII should be read as it was written, without any predetermined bias in favor of Delaware. *See generally New Jersey v. New York*, 523 U.S. 767, 811 (1998); *Texas v. New*

Mexico, 482 U.S. 124, 128 (1987) (a Compact is both a contract and a federal law to be construed according to its terms).

B. The Authority Conferred by Article VII Is Exclusive, Not Concurrent

If Article VII is read according to its terms, the first thing that becomes apparent is that Article VII is a grant of *exclusive* jurisdiction to each State on its side of the river, not a grant of shared jurisdiction. Although the Special Master found that New Jersey's Article VII authority was not exclusive—at least with respect to riparian improvements extending past the low-water mark—his reasoning jumped about according to the particular kind of riparian authority at issue. Thus, the Special Master decided that New Jersey had no authority whatsoever to grant riparian lands past the low-water mark, although it could grant riparian rights past that mark. Report at 52, 99. And, he then went on to find that New Jersey had only partial, non-exclusive riparian jurisdiction beyond the low-water mark. Report at 85-86, 99-100.

This multi-layered analysis, however, only illustrates the distortion that results from the out-of-place presumption against surrender of title. Looked at by itself, Article VII gives no hint that the three kinds of riparian authority conferred by its provisions are to stand on markedly different footing from one another. Indeed, as Article VII is written, the authority to make grants of riparian "lands" is clearly coequal to the authority to make grants of riparian "rights"—the relevant language provides without differentiation that "[e]ach State may . . . continue to . . . make grants, leases, and conveyances of riparian lands and rights"—and a finding that the former is territorially more limited than the latter is bereft of textual grounding. Similarly, there is no justification in the text for treating a State's "riparian jurisdiction" under Article VII as any more or less exclusive than its authority over "riparian lands and rights." Either all the powers conferred

by Article VII are shared by the two States, or none of them is.

The language of Article VII itself makes clear which view is correct: "each" State has exclusive riparian authority on its "own" side, including full authority to grant riparian rights and lands and to exercise riparian jurisdiction.[7] The basic principle of Article VII is that each State will have the authority to regulate riparian improvements that are built on its shores. Consequently, Article VII does not say, or even imply, that Delaware would have authority to grant riparian lands and rights or to exercise riparian jurisdiction on the New Jersey side, but rather declares that the riparian authority given to Delaware, like the riparian authority given to New Jersey, is confined to "its own side of the river." Moreover, the Article VII authority to make grants of riparian rights and lands expressly says that it is to be "under the laws" of the granting State. On the New Jersey side, that State is New Jersey.

This natural division of responsibility is then illuminated by the words "continue to," which introduce an important historical dimension to a State's authority to grant riparian rights and lands, as well as to exercise riparian jurisdiction. Those words plainly indicate that the Compact drafters expected the riparian authority formerly exercised by each State to carry forward into the future. Nor would the extent of that pre-existing authority have been open to question at the time: in 1905, it was absolutely clear that New Jersey—and New Jersey alone—had regulated the construction of riparian improvements on the New Jersey shore. Furthermore, in carrying out that responsibility, New Jersey had repeatedly authorized the erection of piers and wharves that extended beyond the low-water line.

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[7] We discuss *how much* regulatory power is encompassed by these grants of riparian authority in Subsection C *infra*.

That longstanding regulation by New Jersey had taken both general and specific forms. As a general matter, beginning as early as 1851, New Jersey had enacted statutes that granted riparian owners the right to construct improvements on New Jersey's shores, provided that they obtained a license, *see, e.g.*, 1851 N.J. Laws p. 335, and the later-established Board of Riparian Commissioners had adopted pier and bulkhead lines, applicable in the Delaware River within the Twelve-Mile Circle, setting the limits for the filling of underwater lands and for the building of piers. New Jersey had also granted specific authorizations for individual riparian owners to construct piers and wharves extending past the low-water mark within the Twelve-Mile Circle, both by specific legislative acts and through grants from the Board of Riparian Commissioners. As part of its grants, the State had specifically conveyed interests in the underlying lands outshore of the low-water mark as needed to construct the required facilities. *See* page 4 *supra*.

By contrast, Delaware had played no role whatsoever in the approval of riparian structures on the New Jersey shore. Indeed, Delaware had played only a modest part in regulating riparian improvements on its own shore. *See* Report at 69 ("there is little evidence of Delaware's active involvement in shoreland development prior to the mid-1900s on either its own shore or the New Jersey shore . . . ."). As the Special Master observed, "[a]t the time the States entered into the Compact in 1905, and continuing beyond the middle of the twentieth century, Delaware had no formal regulatory system in place governing riparian or coastal development." Report at 69. Instead, the scope of riparian improvements in Delaware was dictated largely by the terms of common law and "generally [was] limited only to the extent they constituted a public nuisance." Report at 69.

Nothing in Article VII suggests an intention to alter that pre-Compact practice, suddenly giving Delaware a previously

unknown authority to grant riparian rights and lands or to exercise riparian jurisdiction on the New Jersey side of the river. Indeed, that would have been an especially odd thing for the Compact drafters to have done: the stated purpose of the 1905 Compact was to resolve points of contention, not to incite new ones. *See* Report, App. B, Preamble.[8] Were the Special Master correct that Article VII provided only non-exclusive riparian authority to each State, Delaware presumably would have been free to exert its regulatory powers over New Jersey improvements even in 1905—at a time when New Jersey staunchly believed that its own territory reached to the middle of the channel—thereby provoking just the sort of jurisdictional controversy that the States were trying to resolve. And, any suggestion that Delaware's concurrent riparian authority was just lying dormant until the time of the boundary determination would be nothing more than a variation on Delaware's broad "standstill" argument, which the Special Master properly dismissed as unsupported.

To bolster his conclusion that New Jersey's riparian jurisdiction was not exclusive, the Special Master placed heavy reliance on the absence of the word "exclusive" in Article VII, pointing out that the word had been employed in other Articles of the 1905 Compact as well as in the 1834 Compact between New Jersey and New York. *See* Report at 61-68. But, even leaving aside that Article VII does not contain the word "concurrent" either, the significance of this omission is severely undercut by the fact that Article VII uses, with respect to "riparian jurisdiction," an equally, if not more, expansive phrase: "of every kind and nature." By any standard, riparian jurisdiction that can be overridden at will by another State does not fit that description. Furthermore, as we

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[8] This Court, in fact, had emphasized customary practices in its injunction against Delaware in *New Jersey v. Delaware I*, the litigation that the Compact was meant to settle. *See* page 6 *supra*.

have just shown, the riparian jurisdiction that New Jersey could "continue to exercise" under Article VII unquestionably had been "exclusive" in the most immediate sense: it was the *only* jurisdiction that had been exercised by either State on the New Jersey side of the river. There was no apparent reason for the parties to treat it as less "exclusive" in the future than it had been in the past.

For its part, Delaware has argued that Article VII cannot have ceded New Jersey exclusive jurisdiction because—given the unbalanced nature of their territorial claims—that would give New Jersey more out of Article VII than Delaware received. *See* Delaware SJ Motion at 34-35. But there is no rule of contract interpretation that requires (or, for that matter, even permits) the Court to equalize the burdens and benefits of a contractual provision between two States.[9] And, in any event, Delaware simply misapprehends the nature of the 1905 Compact. Looked at in its entirety, the Compact is not a "split the difference" agreement, but rather an agreement that, wherever possible, accords equal grants of jurisdiction to the parties *regardless of* their outstanding differences. Thus, for example, Article I gives New Jersey jurisdiction over crimes committed on the "eastern half" of the river and the authority to serve process up to the low-water mark on the Delaware side—a mirror image of the authority given to Delaware in Article II—even though that equal allocation of authority would also be regarded as unequal if viewed in light of the parties' boundary positions. Other Articles in the Compact likewise confer the identical degree of regulatory authority on each State, without adjusting the playing field to compensate for the more expansive territorial claim asserted by Delaware. *See, e.g.*, Report, App. B, Art. V (laws of each State "shall continue in force"); Report, App. B, Art. VI (nothing in

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[9] The record shows that the Delaware Legislature questioned the merits of the Compact, initially refusing to approve it. *See* page 7 *supra*. In the end, however, it accepted the Compact with only minor changes.

Compact shall affect the taking of oysters, etc. "under the laws of either State"). On the same principle, the riparian authority conferred by Article VII is exclusive to each State on its own side of the river.

C. The Exclusive Riparian Authority in Article VII Gives Each State Full Regulatory Authority over Riparian Improvements on its Side

1. *The Scope of Riparian Authority.* If New Jersey's riparian authority under Article VII is exclusive, the remaining question is whether that authority—specifically, the authority both to "make grants, leases, and conveyances of riparian lands and rights under [its] laws" and to "exercise riparian jurisdiction of every kind and nature"—nonetheless leaves room for Delaware to prohibit New Jersey riparian improvements through the exercise of its own "police power." In our view, it does not. Whatever the outer boundary of New Jersey's "riparian" authority may be, it encompasses, at a minimum, full authority to determine the nature and extent of riparian improvements (like wharves and piers) on its shores, including the authority to make the necessary grants of riparian rights and lands past the low-water mark. As a consequence, although Delaware retains much of its police power on the eastern half of the river, it cannot employ that power to interfere with the riparian authority granted to New Jersey by Article VII.

A proper interpretation of the Compact again requires historical context. Although the term "riparian rights" embraces a number of different rights associated with ownership of riparian land, *see* 1 Henry Philip Farnham, *The Law of Waters and Water Rights* § 62 (1904) (NJ App. 1280a), a State's authority over "riparian lands and rights" in 1905 would have encompassed, at the very least, complete authority to determine what riparian improvements—in particular, what piers

and wharves—could be built on its shores, even past the low-water mark. By then, it was firmly established that state law defined the rights of riparian owners, *see Shively v. Bowlby*, 152 U.S. 1, 40-47 (1894), and one widely acknowledged riparian right was the "right of access" to the water, which "include[d] the right to erect wharves to reach the navigable portion of the stream." Farnham § 62, at 279. The latter, in turn, "necessarily include[d] the right to fill in and build wharves and other structures in the shallow water in front of [the upland] *and below low-water mark*." Farnham, § 113, at 534, citing *Miller v. Mendenhall*, 43 Minn. 95, 97 (1890) (emphasis added).[10]

To exercise this riparian "right" to erect piers and wharves out to navigable water, therefore, riparian owners needed to obtain interests in submerged lands, which were usually owned by the State. This was not a serious practical problem, however, because most States were willing to grant the required land interests, recognizing that "[s]uch structures are . . . a necessity if commerce is to be carried on by water." Farnham § 111, at 520. The prevailing view was that "[t]he erection of wharves is for the advancement of the interests of commerce, and, therefore, for the public interest and for the public good," Farnham § 113a, at 533 (NJ App. 1289a), and that it was "for the public good that [the soil between the shore and deep water] be devoted to that purpose." *Id.* Thus, as this Court later observed in *New Jersey v. Delaware II*, "riparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers, and this though the title to the foreshore or the bed may have been vested in the State." 291 U.S. at 375.

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[10] The Farnham treatise pointed out that "[i]t is . . . a necessary incident of the right [to construct wharves and piers] that they shall project to a distance from the shore necessary to reach water which shall float vessels, the largest as well as the smallest, that are engaged in commerce upon the water into which they project." Farnham § 111, at 522.

That was the case in both New Jersey and Delaware, which generally permitted riparian owners to construct wharves and piers on their respective sides of the river outshore of the low-water mark. As we have noted, the 1851 Wharf Act had granted New Jersey riparian owners the right to wharf out to navigable water, provided that they received the appropriate licenses, and the 1871 Act authorized the Board of Riparian Commissioners to grant the required interests in submerged lands. *See* pages 3-4 *supra*. Having established bulkhead and pier lines extending well past the low-water mark, the Board then granted interests in submerged lands up to those lines. In Delaware, the State likewise had established permissible pier and bulkhead lines that extended beyond the mean low-water mark on its side of the river. *See* NJ App. 1198a, 1208a, 1209a; Castagna Report at 3 (Figures 2 and 3).

To be sure, as of 1905, New Jersey and Delaware were still at odds about ownership of the soil beyond the low-water mark on the New Jersey side. It is highly significant, therefore, that, despite this uncertainty about title, New Jersey had been freely granting interests in lands beyond the low-water mark for many years, to facilitate the construction of piers and wharves, without any protest from Delaware. As a result, when Article VII of the Compact specifically provided that New Jersey "*may continue to* . . . make grants . . . of riparian lands and rights under [its] laws . . .," it would naturally have been conveying ongoing authority for New Jersey to grant rights and lands below the low-water mark, as it had been doing, not just above it. Indeed, had Article VII not done so, New Jersey's ability to promote the commercial interests of its citizens would have been immediately threatened. *See* NJ App. 1227a-1239a (Weggel Report) (discussing trends in shipping and pier construction).

The continuing authority for each State to grant riparian lands and rights was then reinforced by Article VII's grant of "riparian jurisdiction of every kind and nature." Although the drafters did not define the term, the word "jurisdiction"

commonly refers to the "authority of a sovereign power to govern or legislate," Webster's Unabridged Dictionary (1898), NJ App. 1317a, and the authority to "exercise riparian jurisdiction of every kind and nature" naturally suggests that each State would be able to exercise regulatory control over the riparian improvements constructed pursuant to its grants of riparian lands and rights.[11] That understanding fits cleanly with the fact that, in another part of the Compact, Article II had given New Jersey jurisdiction over the wharves on its side, specifically prohibiting Delaware from serving process if a person or property is "on board a vessel aground upon or fastened to the shore of the State of New Jersey, or fastened to a wharf adjoining thereto . . . ." *See* Report, App. B, Art. II. Article II thus rested on the understanding that such wharves were generally within New Jersey's exclusive control, even though the wharves extended past "low-water mark on the New Jersey shore" into territory otherwise available for service of process by Delaware.

Although the Special Master objected to the idea that New Jersey could grant "lands" within what is now known to be Delaware territory, Report at 40-46, his view that it cannot do so—a conclusion skewed, of course, by the misplaced presumption against surrender of title (*see Virginia v. Maryland*, 540 U.S. at 67-69)—simply does not hold up. First of all, as we have noted, it is not a reasonable reading of the text: this constricted interpretation of Article VII treats New Jersey's authority to grant riparian lands (limited by the Special Master to New Jersey territory) as far narrower than its authority to grant riparian rights (not limited by the Special Master to

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[11] This Court has found such a conclusion to be reasonable even where a Compact did not expressly provide for riparian jurisdiction, noting in *Virginia v. Maryland* that "[i]f any inference at all is to be drawn from [the Compact's] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens." 540 U.S. at 67.

New Jersey territory), even though the language of Article VII clearly makes them equivalent. *See* pages 27-28 *supra*. Moreover, it would be fundamentally illogical for the Compact drafters to have made the authority to grant riparian rights more extensive than the authority to grant riparian lands, given the fact that the riparian right to construct piers and wharves depends upon the ability to reach navigable water, *see* Farnham § 111, at 520, 522, which in turn depends on the State's authority to grant the interests in land necessary to erect the proposed structures. To provide the authority to grant riparian rights below the low-water mark, without the commensurate authority to grant riparian lands beyond that point, would have been largely an empty gesture.

2. *Riparian Authority and the Police Power.* The Special Master nevertheless determined that, despite these grants of riparian authority, Article VII allows Delaware to exercise jurisdiction over riparian improvements on the New Jersey side, apparently to the point of prohibiting them entirely. In doing so, he appeared to base his conclusion primarily on the idea that riparian authority amounts to just "a subset of the total bundle of police powers," Report at 58, and that Delaware is thus free, beyond the low-water mark, to use its police powers to prohibit what New Jersey would allow. But, though part of this analysis is correct, the bottom line is not. While Delaware certainly can exercise its police powers within its own territory, including on the eastern half of the river, it cannot do so insofar as its regulatory efforts would undercut the riparian authority given to New Jersey in Article VII. In the event of a conflict, Article VII properly takes precedence.[12]

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[12] New Jersey does not claim the right to exercise "full police powers" (Report at 58) beyond the low-water mark on its side of the river, only full riparian authority. For example, New Jersey acknowledges that Article VII does not authorize it to grant permits for its citizens to extract mineral deposits past the low-water mark, or to approve "non-riparian" structures.

That conclusion follows logically from the interdependent relationship between private rights and public interests. It is certainly true, as a starting point, that a State's police power is broader than its authority to define riparian interests, but that does not mean, as the Special Master appeared to believe, that the two are "separate." *See* Report at 56. To the contrary, a State's authority to make grants of "riparian rights" necessarily carries with it the complementary authority to determine how far those rights extend "under [its] laws" (at least absent overriding action by the federal government under the Supremacy Clause). Traditionally, a riparian owner's private rights of wharfage were regarded, not as absolute, but as qualified by—and thus defined by—the bounds of the larger public interest, including those aspects protected by the State's police power. In *Yates v. City of Milwaukee*, 77 U.S. 497 (1870), for example, this Court pointed out the inevitable connection between private rights and the public good, observing that "among those rights [of the riparian owner] [is] . . . the right to make a landing, wharf or pier for his own use or the use of the public, *subject to* such general rules and regulations as the legislature may see proper to impose for the protection of the public, whatever those may be." *Id.* at 504 (emphasis added). *See also Shively*, 152 U.S. at 40 (same). Likewise, the contemporary Farnham treatise, in addressing the interplay between riparian rights and the boundaries of those rights, specifically noted that "the limit of the private right is imposed by the public right, and the private right exists up to the point beyond which it will be inconsistent with the public right." Farnham § 64b, at 290 (discussing riparian water rights). It thus would have been totally contradictory for New Jersey and Delaware to have agreed that one State would have the exclusive power to grant riparian rights and that another State (or even both States together) would have the power to specify the limits of those rights. Those powers are not "separate" powers, Report

at 56, but related parts of the overall sovereign power to balance public and private needs.

To explain the purported separation between a State's authority over riparian rights and its police power, the Special Master placed great reliance on an 1867 opinion by the New Jersey Attorney General. *See* Report at 59-61; 1867 NJ AG Op. (Del. App. 905-911). But that opinion—which was, in any event, superseded by a new statutory scheme two years later (*see* 1869 N.J. Laws ch. 383)—provides little support. Dealing principally with whether the State could transfer lands below the low-water mark to non-riparian grantees, the opinion, in fact, makes quite clear that the right of a riparian owner to encroach on such lands depends entirely on permission from New Jersey, stating that the owner has no such rights "except so far as they are exercised by license under the [1851] general wharf act, or some special grant from the legislature . . . ." Del. App. 909. Furthermore, even with respect to the more extensive riparian "rights of enjoyment," the Attorney General emphasized that New Jersey may limit such rights, without compensation, for "navigation . . . and the great public uses for defence and public safety . . . ." Del. App. 911a. Those explanations, by their very nature, demonstrate that riparian "rights," far from existing "separate[ly]" from a State's general power to protect the public interest, are, in fact, largely defined by that power.[13]

This Court made a similar point in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), a case that Delaware has previously cited in its favor. There, in rejecting a claim by a riparian owner that it had an absolute right to export water to another State, Justice Holmes dismissed the idea of

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[13] The Attorney General also determined that the State could not authorize activities by *private* grantees that would interfere with the riparian owner's "rights of enjoyment"—even if those activities (*e.g.*, turnpikes, railroads) served the public interest in a broad sense—without the payment of compensation. Del. App. 911.

any such uncabined "right," famously observing that "[a]ll rights tend to declare themselves absolute to their logical extreme." *Id.* at 355. Justice Holmes then explained that "all [rights] in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached," *id.*, noting that "[t]he limits set to property by other public interests present themselves as a branch of what is called the police power of the state." *Id.* Once again, therefore, "the limits set to property" are not isolated from the property "right" itself but ultimately determine what the extent of that property "right" will be.

Despite contrary suggestions from the Special Master, *see* Report 58, this broad State authority to establish the limits of riparian rights does not suddenly terminate at the point of specifying the *use* of riparian structures. Setting limits on how property can be used is itself an integral part of defining what property rights are. Thus, it is well-understood that, as this Court recently observed, "[t]he right to improve property . . . is subject to the reasonable exercise of state authority." *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001); *see Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) ("[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit"). Because the right to use property and the boundaries of that right are functionally inseparable, it would make little sense, for example, to speak of a property owner's "right" to develop his property without also taking account of the particular uses allowed (or prohibited) by relevant zoning regulations.

By the same token, it would be wholly unnatural to separate decisions about the right to construct riparian improve-

ments from decisions about the intended use of those improvements, as Delaware proposes to do here. In the first place, the scope of riparian rights has traditionally been defined, in part, by reference to the law of nuisance, *see, e.g.*, *The Auger & Simon Silk Co. v. East Jersey Water Co.*, 96 A. 60 (N.J.E. & A. 1915), which is by its nature directed at assuring that use of property does not injure the public. Moreover, and more specifically here, it was certainly understood in 1905 that riparian structures like piers and wharves were to be used for a particular purpose: the loading and unloading of cargo from vessels. If Delaware were claiming the power to prohibit *that* use, it would effectively be eliminating a riparian right that has prevailed for centuries. Yet, if Delaware's theory is that, under the Compact, one State can decide whether a pier can be built for the unloading of cargo but a different State can determine *what* cargo can be unloaded, it is simply cutting matters too fine. In 1905, the construction of piers and wharves on navigable rivers was regarded as vital to a State's interest in advancing commerce, *see* pages 32-33 *supra*, and it is fanciful to think that the Compact drafters would have agreed to give Delaware final say over the kind of commerce that New Jersey could promote.

Finally, the Special Master's view of Delaware's dominant police power is flatly contrary to the rigorously symmetrical structure of the 1905 Compact. As we have noted, *see* pages 31-32 *supra*, the Compact is organized according to a basic framework of giving the two States equal authority regardless of what the actual boundary turned out to be. Yet, according to the Special Master, Delaware has the power under Article VII to control riparian development on the New Jersey shore—at least by restricting it—even though New Jersey has no power at all over riparian development on the Delaware shore. That sharp inequality might be explicable if the parties had negotiated the Compact *after* this Court's

decision in *New Jersey v. Delaware II*, but, given the lack of certainty about the boundary in 1905, the negotiators expended obvious effort to make the Compact evenhanded. Nothing in it suggests that Delaware came away from the table with a one-way veto power over New Jersey's authority to approve riparian developments on its own side of the river.[14]

3. *Concurrent Jurisdiction and Virginia v. Maryland.* The power that Delaware seeks to assert over New Jersey projects is an extraordinarily sweeping one. Even in 1905, it was well recognized that a State's "police power" encompassed any power necessary "to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals." *Fertilizing Company v. Hyde Park*, 97 U.S. 659, 669 (1878). Although the Special Master never actually says so, therefore, it would appear that, under his view of concurrent jurisdiction, Delaware could assert the right to prohibit all future riparian development on the New Jersey shore, based on nothing more than its judgment that further development would be unsightly and thus aesthetically displeasing to Delaware citizens. Or Delaware could use its zoning authority to allow recreational development, but not industrial development, on the New Jersey side. These kinds of decisions might well meet a test of rationality—looked at from Delaware's point of view—but there is little question that they would seriously limit, if not destroy,

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[14] The Special Master plainly found it implausible that Delaware would choose to cede broad authority to New Jersey in 1905. But, looked at without the improper presumption against surrender of title, the willingness of Delaware to continue what was, after all, the *status quo* is not surprising at all. At the time, the States were vigorously contesting the boundary between them, and this Court had already issued an injunction against Delaware placing great emphasis on the historical division of authority between the States. *See* note 8 *supra*. In addition, Delaware had never shown any interest in regulating riparian improvements on the New Jersey shore, and not a great deal more in regulating them on its own shore.

New Jersey's authority to grant riparian rights and exercise riparian jurisdiction. Thus, while the Special Master apparently saw the idea of "concurrent" powers as a middle ground between the States, the fact is that this parceling out of authority is no middle ground at all: it is an open license for Delaware to block any project on the New Jersey shore that it disapproves of.

Several Terms ago, this Court, in *Virginia v. Maryland*, rejected Maryland's assertion of just that kind of unbounded power. In that case, an 1877 arbitration award had recognized that Virginia, though owning only that part of the Potomac River up to the low-water mark on its own side, had a right to "such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership." *See* 540 U.S. at 69. Although Maryland contended that it could nonetheless regulate construction of a Virginia water intake station extending into its territory—invoking a comparable "police power" theory—the Court found that argument unpersuasive. Relying on the reasoning of the arbitrators' opinion, the Court recognized that "Virginia's right 'to erect . . . structures connected with the shore' is inseparable from, and 'necessary to,' the 'full enjoyment of her riparian ownership' of the soil to low-water mark." 540 U.S. at 72. So it is here: the right of New Jersey to approve wharves and piers built on its shores, even those extending beyond the low-water mark, is inseparable from her right to grant riparian rights and lands and to exercise riparian jurisdiction.

The Special Master sought to distinguish the holding in *Virginia v. Maryland*, pointing to "unique language of the compact and arbitration award in that case." Report at 64-65 n. 118. But nothing about the language at issue in *Virginia v. Maryland* is more protective of riparian rights than the language of Article VII here. For example, the Maryland-Virginia Compact referred to "the privilege of making and

carrying out wharves and other improvements," a privilege that is fully included within the term "riparian lands and rights" in Article VII. *See* pages 32-36 *supra*. And the reference in the Maryland-Virginia arbitration award to "full enjoyment of [Virginia's] riparian ownership" is, if anything, less comprehensive than Article VII's explicit conferral of "riparian jurisdiction, of every kind and nature," as well as the full authority to grant riparian rights and lands. Finally, whereas the Virginia-Maryland Compact referred only to the rights of "[t]he citizens of each state," 540 U.S. at 66, and the arbitrators' award addressed only Virginia's rights of "riparian ownership," 540 U.S. at 69, the 1905 Compact between New Jersey and Delaware expressly speaks to the question of *sovereign* authority over riparian matters, granting each State the authority to "exercise riparian jurisdiction" and to "make grants, leases, and conveyances of riparian lands and rights" on its own side of the river. Thus, the principles applied in *Virginia v. Maryland* apply with full force in this case as well.

II. POST-1905 ACTIONS BY THE PARTIES SUPPORT NEW JERSEY'S READING OF THE COMPACT

The Special Master, in explaining his interpretation of Article VII, placed considerable emphasis on the conduct of the two States after 1905. *See* Report at 68-84. But, while evidence of post-agreement behavior can help in construing contractual provisions, *see O'Connor v. United States*, 479 U.S. 27, 33 (1986), the Special Master made no distinction between post-1905 actions specifically referring to the Compact and actions making no reference to (and, indeed, showing no awareness of) the Compact. If the parties' subsequent conduct is to provide a "practical construction" of a Compact, however, it stands to reason that positions taken without knowledge of the Compact should carry less interpretive force than positions taken with the Compact squarely in mind.

Here, as we discuss, the latter evidence falls entirely on the New Jersey side.

A. *Actions By Delaware*. The most important post-Compact evidence is reflected in statements made by Delaware during the proceedings in *New Jersey v. Delaware II*. In its Reply Brief before the Special Master in that case, Delaware stated that "Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey and a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights." *See* NJ App. 123a. Then, in its oral argument before the Special Master, Delaware counsel asserted that "[w]e say moreover that the Compact of 1905 expressly acknowledged the rights of the citizens of New Jersey, at least, by implication to wharf out, and in my view the Compact of 1905 *ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them*," NJ App. 126a-1 (emphasis added), adding for good measure that "it was a very sensible thing to do." *Id.*

Delaware made similar representations before this Court. In its Reply Brief to the Exceptions filed by New Jersey, Delaware told the Court that "the State of Delaware has never questioned the right of citizens of New Jersey to wharf out to navigable water nor can such a right be questioned now because it is clearly protected by the Compact of 1905 between the States." NJ App. 139a. Later in the same brief, Delaware declared that "[t]he effect of Article VII of the Compact . . . was that the State of Delaware recognized the rights of the inhabitants on the east side of the river to wharf out to navigable water," NJ App. 141a, noting further that "[t]his right had never been questioned and was undoubtedly inserted to put beyond question the *riparian* rights (as distinguished from *title*) of land owners in New Jersey." NJ App. 141. To state the obvious, nothing in these repeated observations suggests that the carefully protected "riparian rights"

were, in fact, subject to nullification by Delaware acting under its "police power."

These representations by Delaware were not just offhand reflections, but in fact played a important role in its claim for title. Responding to evidence that New Jersey had long regulated riparian improvements on its side of the river, Delaware went to great lengths to establish that this exercise of dominion did not demonstrate that New Jersey had *title*, but only that it had broad authority *under the Compact*. Thus, although it slightly qualified its language at one point, *see* Report at 90 (quoting NJ App. 142a), Delaware repeatedly argued that it had ceded riparian jurisdiction to New Jersey by agreement, allowing New Jersey to do what its title otherwise would not have permitted it to do. Furthermore, Delaware's reliance on the Compact served to deflect the practical concern that, if Delaware were to prevail on its boundary claim, it would suddenly be able to prohibit riparian improvements on the New Jersey side. As a result, following a proposal by the States themselves, *see* note 3 *supra*, this Court's decree declared that its boundary determination was "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states." NJ App. 23.

The Special Master here sought to minimize the significance of Delaware's earlier representations, but much of his analysis is off the mark. Thus, while the Special Master said that "New Jersey has not pointed to any statements by Delaware in which it suggested that New Jersey would have the *exclusive* authority to regulate all aspects of riparian improvements, even if on Delaware's land," Report at 89, that overlooks a specific statement saying exactly that: the earlier declaration by counsel that "in my view the Compact of 1905 ceded to the State of New Jersey *all the right* to control the erection of those wharves and to say who shall erect them . . . ." NJ App. 126a-1 (emphasis added). And, contrary to the

view of the Special Master, the representations made by Delaware *did* indicate that "Delaware had given up any claim of jurisdiction also to regulate such [riparian] improvements to the extent they actually do intrude onto Delaware territory." Report at 90. For example, any claim that Delaware can regulate New Jersey riparian improvements to the point of prohibition—as Delaware has done with the Crown Landing project and any project involving "heavy industry use"—is directly contrary not just to Delaware's declaration that New Jersey has "all the right to control" the building of wharves on its side, but to its further representation that "the right of citizens of New Jersey to wharf out to navigable waters . . . is clearly protected by the Compact of 1905 between the States." NJ App. 139a. If Delaware can countermand what New Jersey allows its citizens to do, then the right of New Jersey citizens to build riparian structures like wharves and piers is obviously not "protected," as Delaware represented.

It is also notable that Delaware in the 1930s, having just established the boundary at the low-water mark on the New Jersey side, gave no indication that New Jersey's Compact-based authority over riparian improvements was in any way diminished. Most notably, Delaware neither gave notice to New Jersey that any improvements beyond the boundary line would need Delaware approval nor made any attempt to prohibit such improvements, and New Jersey continued to approve and regulate riparian structures for many years without interference. *See* pages 10-11 *supra*. Even two decades later, Delaware raised no objection to a 1954 formal opinion by the New Jersey Attorney General—provided to the Chief Deputy Attorney General of Delaware pursuant to an inquiry about the need for Delaware's approval of a New Jersey project, NJ App. 306a—stating that New Jersey had exclusive authority under the Compact to issue grants and

leases of riparian lands below the low-water mark on its side of the river. NJ App. 302a-304a (1954 NJ AG Op. No. 3).[15]

Finally, two specific examples of Delaware's understanding of the Compact are directly relevant. In 1957, after Delaware suggested that a DuPont project on the New Jersey shore might require Delaware's approval, counsel for DuPont objected, basing its objection in part on the "Treaty of 1905." NJ App. 636a-637a. Thereafter, counsel for the Delaware Highway Department advised the Department's Chief Engineer that "the State of Delaware has no jurisdiction over grants that may be made in and to the lands lying under the Delaware River on the New Jersey side thereof and within the twelve-mile circle, and that the prior approval of the State of Delaware in such matters is not required," NJ App. 640a, a view that the Chief Engineer accepted. NJ App. 641a. Similarly, more than a decade later, Delaware retreated from a demand to DuPont for lease payments applicable to submerged lands beyond the New Jersey low-water mark, after DuPont notified it that "the 1905 Treaty between New Jersey and Delaware ceded to the State of New Jersey full authority over subaqueous lands from the New Jersey shore to the center of the Delaware River, including the right to convey title to such lands." NJ App. 648a.

B. *Actions By New Jersey.* The Special Master concentrated his attention mainly on later events, beginning in 1971, including various statements and actions by New Jersey offi-

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[15] The Special Master failed to grasp the importance of this letter, discounting it on the ground that the Attorney General took the "inconsistent" view that New Jersey could not authorize the *dredging* of lands past the low-water mark. Report at 42 n.42. But the Attorney General was simply making a basic distinction between granting interests in submerged lands for traditional riparian purposes, such as the construction of piers and wharves, and granting interests for non-riparian purposes, such as general dredging by entities that are not riparian proprietors. NJ App. 304a. New Jersey does not claim the latter authority under Article VII.

cials that seemed to accept Delaware's regulation of projects on the New Jersey shore. But the most striking thing about this evidence is the lack of any reference by those New Jersey officials to the Compact itself, much less to the terms of Article VII. Indeed, the Special Master does not cite a single instance where a New Jersey official took note of the 1905 Compact and declared that, despite its language, Delaware still had the authority to control riparian development in New Jersey. As a result, there is nothing in this recent material that can fairly be said to reflect New Jersey's conscious view of the Compact.

The reliance by the Special Master on New Jersey's conduct thus becomes largely indistinguishable from a decision concluding that New Jersey has forfeited its Compact rights through prescription and acquiescence. *See, e.g., Illinois v. Kentucky*, 500 U.S. 380, 384-85 (1991); *New Jersey v. New York*, 523 U.S. at 807. Even if that were theoretically possible—a Compact is a federal law—it would be inappropriate here. For one thing, the Special Master mostly disregarded other probative evidence showing that New Jersey had maintained the exclusive right to regulate riparian improvements on its shores. *See, e.g., Main Associates, Inc. v. B.&R. Enterprises, Inc.*, 181 A.2d 541 (N.J.Super. Ch. 1962). Furthermore, to establish a loss of rights through prescription and acquiescence, a State must show that the relevant conduct continued for a "substantial" period of time, *Virginia v. Maryland*, 540 U.S. at 76; *New Jersey v. New York*, 523 U.S. at 786, and Delaware has not even argued that it can prevail under that standard. A State cannot work around that deficiency simply by recasting its evidence of "acquiescence" in order to revise the natural meaning of the Compact.

The Special Master also dismissed New Jersey's attempts to characterize much of the "acquiescence" evidence as signs of voluntary cooperation, *see* Report at 73, but that dismissal was too abrupt. The Federal Coastal Management Act, en-

acted in 1972, sought to encourage coordination and cooperation with respect to federal, state, and local management of the coastal zone, *see* 16 U.S.C. § 1452(4),(5), and it would have been fully in keeping with the Act for New Jersey to have coordinated its regulatory activities with Delaware whenever possible. And, given their long history of Delaware River disputes, it also makes sense for New Jersey to cooperate with Delaware in order to promote interstate comity, particularly because (until Delaware shut down the Crown Landing project) the States had been able to work together without actually inhibiting riparian development on the New Jersey shore. New Jersey's attempts at cooperation thus do not necessarily imply a narrow view of its rights under the (unmentioned) Compact. *See generally* 16 U.S.C. § 1456(e) (CZMA does not "displace, supersede, limit, or modify any interstate compact").

That said, it is unquestionably the case that, in a number of recent instances, New Jersey has accepted Delaware's involvement in the process of issuing permits for New Jersey improvements—including one improvement to be undertaken by New Jersey itself—without making any protest of Delaware's right to do so. But this small collection hardly is a match for the long history of instances noted in *Virginia v. Maryland*, in which Virginia officials had sought Maryland's approval for improvements on the Virginia shore. *See* 540 U.S. at 63. As this Court observed, "[b]etween 1957 and 1996, Maryland issued, without objection, at least 29 water withdrawal permits to Virginia entities" and "[s]ince 1968, it has likewise issued numerous waterway construction permits to Virginia entities." *Id.* Despite these activities, the Court nevertheless found that Virginia had not acquiesced in Maryland's legal right to exercise its police power over riparian improvements on the Virginia shore. *See* 540 U.S. at 76-80. And, while the Court did not separately reject this evidence as proof that the 1785 Compact and 1877 Award gave Maryland jurisdiction over Virginia projects, it seems highly doubtful

that it would have ruled against Maryland's claim of regulatory authority, as it did, if it had found the evidence to be persuasive. The evidence submitted by Delaware merits no greater weight.

CONCLUSION

The Exceptions of New Jersey to the Report of the Special Master should be sustained, and the Court should enter New Jersey's Proposed Decree (Report, App. G).

Respectfully submitted,

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